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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1947

JAMES F. MORRIS, PETITIONER

v.

WILLIAM R. McCOMB, ADMINISTRATOR OF THE WAGE AND HOUR DIVISION, UNITED STATES DEPARTMENT OF LABOR

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

BRIEF FOR THE ADMINISTRATOR

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OPINIONS BELOW

The district court wrote no opinion. The conclusions of law of the district court (R. 39) are not reported. The opinion of the Circuit Court of Appeals for the Sixth Circuit (R. 48–50), reversing the judgment of the district court, is reported at 155 F. 2d 832.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 29, 1946 (R. 47). The petition for a writ of certiorari was filed on August

21, 1946, and was granted on April 7, 1947, limited to the second question presented in the petition (R. 55). The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether employees of a motor carrier, all of whose transportation activities are performed wholly within the Detroit metropolitan area in the State of Michigan, and "a very small proportion" of whose activities constitutes interstate commerce, are exempted from the overtime provisions of the Fair Labor Standards Act under Section 13 (b) (1) of that Act.

STATUTES INVOLVED

The relevant provisions of the Fair Labor Standards Act and of the Motor Carrier Act are set forth in Appendix A, *infra*, pp. 43–45.

STATEMENT

Petitioner, a motor carrier, is the sole owner and operator of a general cartage business in Ecorse, Michigan (R. 48). His principal business consists of the transportation, entirely in the State of Michigan in the metropolitan area of Detroit, of steel used in the manufacture of automobiles and parts (R. 11, 14). Petitioner employs approximately 60 persons including 40 truck drivers, 14 mechanics, painters, washers and repairmen, a superintendent of maintenance, and 3 dispatchers (R. 48, 49). The truck drivers

engage in hauling of the types hereafter described. The character of the work of the mechanics, painters, washers and repairmen does not appear in the record except as revealed by their descriptive titles. The dispatchers, who are paid at hourly rates, have supervisory authority over the drivers (R. 17). The superintendent of maintenance, who is paid a straight weekly wage, has supervisory authority over the mechanics and laborers, works the same schedule of hours as they do, and spends approximately 25 per cent of his time in performing the routine tasks of a mechanic and laborer. All of these employees worked in excess of the statutory maximum without receiving overtime compensation in accordance with Section 7 of the Fair Labor Standards Act (R. 16, 17).

Between August 1, 1940 and August 1, 1941, petitioner's truck drivers were employed pursuant to the terms of a collective bargaining agreement which provided for overtime compensation for weekly hours in excess of 52; since August 1, 1941, the collective bargaining agreement has provided for overtime compensation with respect to hours worked in excess of 54. These collective bargaining agreements are general agreements covering all union drivers engaged in general cartage operations within the area, apparently without regard to whether the employer is a motor carrier subject to the provisions of Section 204 (a) of the Motor Carrier Act (R. 18, 19).

The agreement, which is set out in full in the record (R. 28–38), provides (par. 8, R. 32) among other things, that any of its provisions subsequently determined to be in violation of the Fair Labor Standards Act or applicable state law "are to be changed so that there is no violation of the statutes, provided, however, that such changes shall not result in any substantial penalties to members of the Union or the company."

Approximately 3 per cent of petitioner's business consists of trips between steel plants and interstate terminals in Detroit (R. 12, 13). Approximately 60 per cent of the cartage services involves the transportation of steel from the mills of the Great Lakes Steel Corporation and the Michigan Steel Corporation at Ecorse, Michigan, to manufacturers in the Detroit metropolitan area (R. 12). Approximately 35 per cent of petitioner's operations consists of the transportation of unfinished steel within the plants of the two above-mentioned mills or interplant hauling between the two mills (R. 12). In these operations, petitioner's trucks often operate within the plant and without leaving the plant for several days (R. 12). Ninety-nine per cent of petitioner's operations is performed for the Great Lakes Steel Corporation and the Michigan Steel Corporation, located in Ecorse, Michigan, both subsidiaries of the National Steel Corporation (R. 12, 13). Only one per cent of petitioner's business is performed for shippers other than

these two mills (R. 13). Petitioner's drivers never drive outside the Detroit metropolitan area in the State of Michigan (R. 11).

The small percentage of trips (3.65%) in which petitioner's drivers haul goods moving in interstate commerce are made to or from boat docks, railroad depots, freight terminals and truck terminals in the Detroit metropolitan area, wholly within the State of Michigan, at which points the drivers pick up or deliver interstate freight shipments (R. 15).[1] Of a total of 19,786 truck trips of all types made during 1941, 2.34 per cent, or 464, were "interstate" trips made to railroad or motor carrier depots, and 1.31 per cent, or 260, were "interstate" trips made to the boat docks of steamship companies (R. 13, 15).

During 1941 (the calendar year immediately preceding the filing of the complaint), 43 drivers worked a total of 1903 weeks. Of this total, 1438 or 75.6 per cent of the weeks worked were devoted exclusively to intrastate transportation activities (R. 24–27). In only 465 or 24.4 per cent of the weeks did one or more trips involving interstate shipments occur (R. 24–27). Thus, local interplant hauling was performed exclusively by the "average" driver in 75.6 per cent of the weeks worked (R. 16, 27, 49). Two employees were exclusively engaged in interplant hauling during the full period of their employment during 1941

[1] Trips of this type, for convenience, are referred to herein as "interstate" trips.

(R. 16, 26, 27, 49), and, with the exception of two other employees, all of petitioner's drivers were exclusively engaged in interplant hauling during the greater part (50 per cent or more) of the weeks worked in the year (R. 16, 26, 27). Twenty-six of petitioner's 43 drivers, or 60 per cent, spent all their time in interplant hauling during 75 to 100 per cent of the weeks worked in the year (R. 26, 27). The two drivers who made "interstate" trips in a majority of the weeks (51) in which they worked during the year drove in intrastate trips exclusively for 24 and 22 weeks, respectively (W. Chase and L. Ruby, R. 26, 27). No individual driver appears to have made "interstate" trips regularly from week to week; rather, such trips are shown to have occurred on sporadic occasions throughout the year. Typically, one or two trips of this character would be made in a particular week, or consecutive weeks, followed by one or more, and often many, weeks in which no such trips were made (Exhibit "C" referred to at R. 15).[2] Of a total of 1903 weeks worked by individual drivers in the year (R. 27), in which a total of 19,786 trips were made (R. 15), there were 319 in which the driver made only a single trip to a boat dock or freight terminal, and 85 weeks in which he made two such trips. In only 61 of the 1903 weeks did a driver make more than two "interstate" trips (Exhibit "C").

[2] Exhibit C is not printed in the record but a copy has been lodged with the Clerk of this Court.

In this suit to enjoin the petitioner from violating the Fair Labor Standards Act (R. 2–5), the district court held that petitioner and his employees were not engaged in the production of goods for commerce and that in any event, to the extent that they might be considered engaged "in commerce", the dispatchers and superintendent of maintenance were exempt under Section 13 (a) (1) as employees employed in a bona fide executive or administrative capacity, and the truck drivers and the garage employees were exempt under Section 13 (b) (1) of the Act (R. 39). (See Appendix A, *infra*, p. 43.) The judgment was reversed on all points by the circuit court of appeals (R. 47–54), which held that petitioner had failed to meet the burden of bringing himself within either exemption. The appellate court held, with respect to Section 13 (b) (1), that the power of the Interstate Commerce Commission to establish qualifications and maximum hours of service, and the corresponding exemption, extends to truck drivers whose work affects safety of operation and to mechanics who actually perform inspection and repair work on trucks, but that it does not extend to such garage employees as painters, washers and dispatchers (R. 52). It also held that a truck driver engaged in driving trucks both in interstate and intrastate commerce "must devote a substantial part of his time to the driving of trucks in interstate commerce in order to come within the exemption provision," but that it was

unnecessary to determine what constitutes "a substantial part" of the time of an employee because the facts failed to show more than "a very small proportion of time devoted to interstate transportation." (R. 52–53.)

SUMMARY OF ARGUMENT

I

Petitioner has not shown that any of his nondriving employees are employees of the kind described in Section 13 (b) (1). This exemption from Section 7 of the Act applies only to those employees whose activities directly affect the safety of operation of motor vehicles in interstate transportation. *United States* v. *American Trucking Assns.*, 310 U. S. 534; *Levinson* v. *Spector Motor Service*, 330 U. S. 649; *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695; *Ex Parte No. MC–28*, 13 M. C. C. 481; *Ex Parte Nos. MC–2 and MC–3*, 28 MCC 125. The Interstate Commerce Commission has defined and limited the classes of employees whose activities directly affect such safety of operation. *Ex Parte Nos. MC–2* and *MC–3, supra;* see also *Ispass* and *Levinson* cases, *supra.* There is no evidence that any of petitioner's nondriving employees is actually engaged in any activities affecting safety of operation of motor vehicles used for transportation in interstate or foreign commerce. And the record in this case is devoid of evidence that any of the activities engaged in by the dispatchers, painters, washers, mechanics, repairmen, or by the super-

intendent of maintenance are of a kind performed by "drivers," "loaders," "drivers' helpers," or "mechanics" as the Commission has defined them. Since the Commission has expressly found that no other classes of employees directly affect "safety of operation," there is no basis for holding Section 13 (b) (1) applicable to these employees of petitioner. *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 708; *Ex Parte Nos. MC–2* and *MC–3, supra.*

II

A. *Petitioner's drivers are not within the exemption provided by Section 13 (b) (1).* The circuit court of appeals correctly held that driving in interstate commerce must constitute a substantial part of an employee's activities before the exemption will apply, and that the "very small proportion" of such driving performed incidentally on sporadic occasions by petitioner's drivers did not meet this test.

The rule applied by the circuit court of appeals best accomplishes the purposes of both the Motor Carrier Act and the Fair Labor Standards Act. It is not inconsistent with anything decided by this Court in *Levinson* v. *Spector Motor Service,* 330 U. S. 649, the question here involved having been expressly left open in *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695. The ruling of the court below does not conflict with the safety program of the Interstate Commerce Commission, and it gives practical effect, in a peripheral area of application of the Motor Car-

rier Act, to the underlying policy of Congress that the long hours of truck drivers should be regulated. Undesirable consequences, inconsistent with accepted purposes of the statute, would follow adoption of the construction for which petitioner contends. Avoidance of such a construction by affirmance of the decision below would best carry out the legislative intent.

B. *The exemption does not apply in any event to petitioner's drivers in those workweeks when they do no "interstate" driving.* The workweek principle for measuring overtime obligations under the Act requires that petitioner's drivers be held subject to the provisions of Section 7 in the large majority of their workweeks in which no driving subject to the authority of the Interstate Commerce Commission was done. *Overnight Motor Co.* v. *Missel,* 316 U. S. 572; *Ex Parte No. MC–3,* 23 M. C. C. 1, 39.

ARGUMENT

I

PETITIONER'S NONDRIVING EMPLOYEES ARE NOT EXEMPTED FROM SECTION 7 BY SECTION 13 (B) (1)

Petitioner has not sustained the burden[3] of showing that any of his garage employees or dispatchers are excluded from the overtime benefits

[3] The courts have consistently held that the burden rests on the employer to show that an exemption from the Act is applicable. *Walling* v. *General Industries, Inc.,* 330 U. S. 545, 547–548; *A. H. Phillips, Inc.* v. *Walling,* 324 U. S. 490; *Armstrong Co.* v. *Walling,* 161 F. 2d 515 (C. C. A. 1); *Helli-*

of the Act by virtue of the exemption provided in Section 13 (b) (1). The record shows only that petitioner employed approximately 14 persons "as mechanics, painters, washers and repairmen in the garage", and three persons "as dispatchers" during the calendar year immediately preceding the filing of the Administrator's complaint (R. 11), and that these employees were paid at hourly rates without extra compensation for overtime (R. 16, 17). The duties of these persons are not otherwise described. It further appears that petitioner employs a superintendent of maintenance, "who works the same schedule of hours as the other mechanics and laborers, [and] devotes approximately twenty-five (25) per cent of his time to the performance of routine physical tasks of the same general character as that of the employees working under his direction and supervision." (R. 17.)

These facts clearly do not establish that any of petitioner's garage employees or dispatchers, or his superintendent of maintenance, engages in any activities directly affecting safety of operation of motor vehicles in transportation in interstate or foreign commerce. Unless they are so

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well v. *Haberman*, 140 F. 2d 833 (C. C. A. 2); *Stanger* v. *Vocafilm Corp.*, 151 F. 2d 894 (C. C. A. 2); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Helena Glendale Ferry Co.* v. *Walling*, 132 F. 2d 616 (C. C. A. 8); *Rockton & Rion Ry. Co.* v. *Walling*, 54 F. Supp. 342 (W. D. S. C.), affirmed 146 F. 2d 111 (C. C. A. 4), certiorari denied, 324 U. S. 880; *Snyder* v. *Wessner*, 55 F. Supp. 971 (D. Minn.).

engaged, the Interstate Commerce Commission is without power to establish qualifications and maximum hours of service with respect to them, and they are, accordingly, not exempted from the overtime provisions of the Act under the terms of Section 13 (b) (1). *United States* v. *American Trucking Associations,* 310 U. S. 534; *Levinson* v. *Spector Motor Service,* 330 U. S. 649; *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695; *Ex Parte No. MC–28,* May 9, 1939, 13 M. C. C. 481; *Ex Parte Nos. MC–2 and MC–3,* March 4, 1941, 28 M. C. C. 125.

In *Ex Parte Nos. MC–2 and MC–3, supra,* the Interstate Commerce Commission found as a fact that mechanics, loaders, and drivers' helpers employed by carriers subject to Part II of the Interstate Commerce Act, who performed duties described by the Commission, devote a "large" or "substantial" part of their time to activities directly affecting safety of operation of motor vehicles in transportation in interstate commerce. At the same time, the Commission found as a fact that no other employees of such carriers, except drivers, perform duties which directly affect safety of operation. *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 138, 139. In the same proceeding, the Commission expressly found that employees performing the normal duties of dispatchers, as described by it, "engage in no activities which directly affect the safety of operation of motor vehicles in interstate or foreign commerce." It made similar findings with respect to "em-

ployees who do nothing but oil, gas, grease or wash the motor vehicles," "men who do nothing but paint vehicles," and "carpenters" and "tarpaulin tailors." *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 133–135. These findings of fact are, of course, "squarely within the jurisdiction of the Commission." *Levinson* v. *Spector Motor Service, supra,* at page 669. As this Court has said, "The special knowledge and experience required to determine what classifications of work affect safety of operation of interstate motor carriers have been applied by the Commission. The determination whether or not an individual employee is within any such classification is to be determined by judicial process." *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. at 707. If petitioner's painters and washers did any work other than painting or washing vehicles (activities which the Commission has found not to affect safety of operation), it may be assumed that evidence of such work would have been presented.[4] In the absence of such evidence, there is clearly no basis for holding the exemption applicable to the "painters" and "washers." The same is true with respect to the dispatchers. See *Ispass* opinion at p. 708.

The record is devoid of evidence as to the duties of petitioner's "mechanics" and "repair-

[4] The stipulation of facts on which the case was heard provided for the introduction by either party at the hearing of relevant and material evidence of other facts not inconsistent with those stipulated (R. 11).

men." It does not appear to what extent, if any, these employees engage in activities of the kinds performed by the "mechanics" whom the Commission found to be engaged in work directly affecting "safety of operation." There is nothing in the record to indicate that any of these employees actually performs any duties in any particular week with respect to any vehicle used by petitioner in transportation in interstate or foreign commerce. It follows that they cannot be deemed exempt as engaged in work directly affecting safety of operation under the Commission's view that "the term 'safety of operation', as used in section 204 (a) of part II of the Interstate Commerce Act, means the safety of operation of motor vehicles *in the transportation* of passengers or property *in interstate or foreign commerce,* and that alone." (Emphasis supplied.) *Ex Parte Nos. MC–2 and MC–3,* 28 M. C. C. 125, 139 (Conclusions of Law No. 1). This conclusion is reinforced by the fact that it does not appear to what extent, if any, petitioner's mechanics and repairmen performed work, such as keeping the lights and brakes of such vehicles in good condition, which the Commission has found to be work directly affecting safety of operation. All or some of them may have been engaged in work of another character. The district courts, as shown in the footnote, have held that various types of mechanical or repair work

do not directly affect safety of operation.[5] Without attempting to suggest whether these decisions correctly evaluate the safety character of the work performed, it is reasonably clear that many types of repair activities may not directly affect safety of operation. Since the burden of establishing an exemption is on the employer (see note 3, pp. 10–11, *supra*), we submit that the silence of the record with respect to the duties of the mechanics and repairmen requires the denial of the exemption. This conclusion is fortified in the instant case by the fact that only three per cent of petitioner's activities are in interstate commerce. This being true, it cannot reasonably be assumed without specific proof that the work of any mechanic in any particular workweek related to trucks which were actually employed in making interstate trips. Cf. *Schulte Co.* v. *Gangi*, 328 U. S. 108, 118. Moreover, even if it

[5] In *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W. D. Ky.), it was held that the repair work must be performed on the motor vehicle and that the repair of parts and batteries removed from trucks to be put in stock for future use was not safety work. Vulcanizing and patching tubes and remounting tires on rims were also considered non-safety work. Similarly, the rebuilding and reconditioning of automobile, bus, and tractor bodies has been held not to affect safety. *Anuchick* v. *Transamerican Freight Lines*, 46 F. Supp. 861 (E. D. Mich.); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (W. D. Ky.); *Walling* v. *Burlington Transp. Co.* (D. Neb.), 9 Labor Cases, par. 62,576. Other types of work performed by repairmen which do not affect safety are also described in *McDuffie* v. *Hayes Freight Lines, Inc.*, 71 F. Supp. 755 (E. D. Ill.).

were arbitrarily assumed that each mechanic in each workweek spent three per cent of his time working on trucks which were used in interstate commerce and that this work affected safety of operation, we believe, for the reasons developed hereafter, that this would not constitute a sufficiently substantial part of his work to warrant application of the exemption.

II

PETITIONER'S DRIVERS ARE NOT EXEMPTED FROM SECTION 7 BY SECTION 13 (b) (1)

This case involves the question as to which this Court reserved decision in *Pyramid Motor Freight Corp.* v. *Ispass,* 330 U. S. 695, 708 (cf. *Levinson* v. *Spector Motor Service,* 330 U. S. 649): Is there an exemption under Section 13 (b) (1) of the Fair Labor Standards Act, based on the power of the Interstate Commerce Commission under Section 204 of the Motor Carrier Act to prescribe qualifications and maximum hours of service for employees of motor carriers whose activities include some which affect safety of operation of motor vehicles in transportation in interstate or foreign commerce, where such safety activities constitute less than a substantial part of the activities in which the employee is engaged? It is the Administrator's position that the court below properly held the "very small proportion of time devoted to interstate transportation" by petitioner's drivers to be insufficient, on the facts

disclosed by the record, to bring these drivers within the scope of the exemption provided by Section 13 (b) (1).

Prior to this Court's consideration of the *Levinson* case, the Interstate Commerce Commission, after careful consideration of the extent of its power under Section 204, concluded that it "is limited to those employees [of common, contract, and private carriers] who devote a *substantial part of their time* to activities which directly affect the safety of operation of motor vehicles in the transportation of passengers or property in interstate or foreign commerce." *Ex Parte Nos. MC–2 and MC–3, supra* (Conclusions of Law No. 2, 28 M. C. C. 125, 139). [Italics supplied.][6] In its brief in the *Levinson* case, however, the Commission argued that if an employee of a motor carrier is engaged in operations relating to safety

[6] In reaching this conclusion, the Commission referred to and followed decisions interpreting the scope of the Hours of Service Act (Act of March 4, 1907, c. 2939, 34 Stat. 1415, 45 U. S. C. 61), which is also administered by the Interstate Commerce Commission. That Act restricts employees actually engaged in or connected with the movement of trains from working more than 16 consecutive hours, subject to the proviso that "an operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, dispatches trains" shall not be on duty more than 9 hours in any period of 24 hours. Under this Act, the argument that the proviso applied to employees such as conductors and switchmen who used the telephone only occasionally to transmit orders to engineers has been rejected. *United States* v. *Florida East Coast Ry. Co.*, 222 Fed. 33 (C. C. A. 5); *Missouri Pac. Ry. Co.* v. *United States*, 211 Fed. 893 (C. C. A. 8).

for any time at all, it has some power over him. The Solicitor General did not take issue with this claim, but did question the suggestion that this automatically determined the application of the exemption from the Fair Labor Standards Act. He pointed out that to allow the exemption to reach employees who work an insubstantial portion of their time in work subject to the Commission's power would open an easy avenue of evasion. Inasmuch as it was found in the *Levinson* case that a substantial part of the employee's work was subject to the Commission's power, the Court was not immediately confronted with the problem raised by the Solicitor General. The facts in this case, however, present this problem directly.

The record is clear that the only driving performed by petitioner's employees which might possibly be subject to the regulatory power of the Interstate Commerce Commission under Section 204 (a) of the Motor Carrier Act is the "very small proportion" referred to by the circuit court of appeals (R. 53).[7] Such driving, performed wholly in Michigan within the Detroit Metropolitan area (R. 13), accounts for less than

[7] Almost all (between 96 and 97 per cent) of petitioner's operations and of his employees' activities (R. 12, 15) are confined to the transportation of goods moving *intra*state within the Detroit metropolitan area (R. 11–13) as a part of the production of such goods for commerce (R. 51). The Interstate Commerce Commission does not have regulatory power with respect to such transportation under the Motor

4 per cent of the trips made by petitioner's drivers in the course of a year's work (R. 15). It consists of trips to boat docks or freight terminals to pick up or deliver freight moving interstate between points outside Michigan and points in that State within the Detroit area (R. 13). The great majority of these trips are made to or from the plants of the two steel corporations with whom petitioner does virtually all of his business (R. 13), and appear to constitute an incidental and relatively inconsequential part of his general hauling business. In fact, approximately 99 per cent of petitioner's transportation activities are performed for the Great Lakes Steel Corporation and the Michigan Steel Cor-

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Carrier Act. Sections 202 (a), (b), 203 (a) (14), (15), (16), (17). See also *Crude Talc from California Mines to Dunn, Cal.*, 44 M. C. C. 714; *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2); *Walling* v. *DeSoto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Dallum* v. *Farmers Cooperative Trucking Assn.*, 46 F. Supp. 785 (D. Minn.). Cf. *Interstate Commerce Commission* v. *Columbus & G. Ry. Co.*, 153 F. 2d 194 (C. C. A. 5). Petitioner, when engaged in such transportation, does not act as a "motor carrier" subject to the provisions of the Motor Carrier Act. *Elmer C. Breuer, Inc., Extension—Ohio, No. MC-59358 (Sub. No. 2)*, March 25, 1940, 1 Fed. Carriers Cases par. 7483. His employees, when so engaged, do not perform activities affecting "safety of operation" within the meaning of Section 204 (a), under the Commission's definition of that term. *Ex Parte Nos. MC-2 and MC-3*, March 4, 1941, 28 M. C. C. 125, 139 (Conclusions of Law, No. 1); see also *Ex Parte No. MC-28*, May 9, 1939, 13 M. C. C. 481, 482, 488; *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 685; *United States* v. *American Trucking Assns.*, 310 U. S. 534.

poration in connection with their steel manufacturing business (R. 12–13) in Ecorse, Michigan, adjacent to Detroit (R. 11). Petitioner's activities are integrated with those of the two companies (subsidiaries of the National Steel Corporation) in the production of steel and steel products which ultimately move in interstate commerce. Petitioner's trucks often operate within a single plant without leaving the plant for several days. (R. 12.)

It does not appear that any of petitioner's drivers are regularly assigned to, or regularly make, these "interstate" trips. Some make none at all; the others make them only occasionally and sporadically (R. 15, 16, 24–27; Exhibit "C", see *supra*, note 2, p. 6). As petitioner admits in his brief, the record discloses "a total lack of uniformity in the allocation [of these trips] among the various employees * * *". (Pet. Br. 48), and there is "compelling evidence that the handling of freight in interstate commerce is based upon happenstance" (Pet. Br. 27). The infrequency of these "interstate" trips is emphasized by the fact that the "average" driver makes none of them in more than three-fourths of the weeks worked within a period of a year (R. 16, 27, 49).

If the qualifications and hours of service of petitioner's drivers are not subject to regulation under the Motor Carrier Act, it is clear that petitioner's drivers do not come within the terms

of the exemption from Section 7 which Section 13 (b) (1) provides. The Administrator's argument here, however, is not rested on this ground. It is his position that even if, under Section 204 of the Motor Carrier Act, petitioner's drivers are subject to the Commission's power with respect to the small amounts of "interstate" driving they do on sporadic occasions, it does not follow that they are employees of the kind to which Section 13 (b) (1) refers and who are exempted by that Section from the provisions of Section 7. To hold the exemption applicable to these employees, virtually all of whose activities are not subject to the Commission's power, would require a reading of Section 13 (b) (1) which would seem "plainly at variance with the policy of the legislation as a whole." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543; *Ozawa* v. *United States,* 260 U. S. 178, 194. The national policy as derived from both the Motor Carrier Act and the Fair Labor Standards Act, when applied to the circumstances of this case, would seem to require that both statutes be permitted to operate in their respective spheres.

A. *Section 13 (b) (1) is not applicable where only a "very small proportion" of employees' activities is subject to regulation under the Motor Carrier Act.*—If this Court should conclude that petitioner's drivers, when they engage in small amounts of interstate activities on sporadic occasions, come within the power of the Commis-

sion under Section 204 of the Motor Carrier Act, we do not believe this would be an adequate basis for the further conclusion that petitioner's drivers are exempted by Section 13 (b) (1) from the overtime benefits of the Fair Labor Standards Act. It is the Administrator's position that the "substantial part" rule followed by the court below ought to be applied here because it best accords with the terms and purposes of both statutes and gives practical effect, in a peripheral area of application of the Motor Carrier Act, to the underlying policy of Congress that the long hours of truck drivers should be regulated.

The extremely limited scope within which the Commission's power can conceivably operate where less than a substantial part of an employee's activities affect safety of operation in interstate commerce suggests that the reasons for the exemption accorded by Section 13 (b) (1) of the Fair Labor Standards Act do not exist in such a case. If the Commission's regulatory power extends to petitioner's drivers,* it does so only with respect to the "very small proportion" of their activities represented by their occasional

*The Commission's hours-of-service regulations (49 C. F. R. Cum. Supp. Part 191) define a "driver" (sec. 191.1 (b)) as "any individual who drives in transportation *in interstate or foreign commerce* any motor vehicle * * *" (italics supplied). Petitioner's drivers do not fall within this definition except in the occasional and sporadic instances when they make a trip to a boat dock or a freight terminal.

trips to freight terminals or boat docks.* This is necessarily true because, as shown earlier herein, the Commission's power under Section 204 (a) of the Motor Carrier Act is confined to regulation of transportation in interstate and foreign commerce, and is limited to activities of employees affecting the safety of operation of motor vehicles engaged in such transportation. The Act does not confer upon the Commission power to regulate any other kind of work. It is true, as this Court recognized in the *Levinson* case (330 U. S. at 675, 679), that the Commission can establish "maximum hours of service" under which an employee will not be permitted to engage in any "safety" activities after spending a certain number of hours on duty in *any* kind of work (safety, nonsafety, interstate or intrastate). The Commission, as this Court noted, has done so with respect to drivers. 49 C. F. R. Cum. Supp. Part 191, sec. 191.3. See also *Ex Parte No. MC-2*, 3 M. C. C. 665, 6 M. C. C. 557, 11 M. C. C. 203; *Ex Parte No. MC-3*, 23 M. C. C. 1. But this

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* This court recognized in *Pyramid Motor Freight Corp.* v. *Ispass*, *supra*, (at p. 708), that "even the placing of certain articles of freight on a motor carrier truck may form so trivial, casual or occasional a part of an employee's activities * * * that his activities will not come within the kind of 'loading' which is described by the Commission and which, in its opinion, affects safety of operation." To the extent that the facts may justify the application of a similar principle to the activities of any of petitioner's drivers, such drivers would clearly not be engaged in activities which provide a basis for exemption under section 18 (b) (1).

power to limit engagement in interstate transportation activities to employees who have not worked too long at any kind of task is by no means equivalent to a "power to establish * * * maximum hours" for noninterstate and other nonsafety work. As the Commission has recognized, the hours spent in such work are not subject to its regulatory power. Thus, the Commission has ruled that a driver who does no interstate driving in a given week is not subject to regulation by it of his daily or weekly maximum hours in that week. *Ex Parte No. MC–3*, 23 M. C. C. 1, 39. See 49 C. F. R. Part 191, Secs. 191.1 (a)–(e), 191.3. Similarly, an employee who does interstate driving early in the week and spends the latter part of the week in intrastate driving or other nonsafety work is not subject to any limitation on the number of hours he may devote to such work.[10] It follows that petitioner's drivers, in those periods when they are not engaged in hauling interstate shipments or in

[10] Interstate Commerce Commission, Bureau of Motor Carriers, Ruling No. 79, May 16, 1939. The ruling used the illustration of an "extreme case" in which 60 hours had been spent on duty in interstate work in the first five days of the week, and 24 more hours were spent in intrastate work thereafter. The ruling also pointed out that if any of these hours should fall within the 168-hour period immediately preceding the driver's return to driving or other safety work in interstate commerce, they would, of course, be *counted* with other hours of duty to determine whether performance of the interstate work would result in exceeding the maximum weekly limit applicable to interstate work.

other work affecting safety of operation in interstate commerce, are not in any real sense "employee[s] with respect to whom the Interstate Commerce Commission has" the "power" referred to in Section 13 (b) (1).

It would seem to require an unnecessarily literal reading of Section 13 (b) (1) to construe it to mean that, for purposes of the Fair Labor Standards Act, a person is, in the light of his activities as a whole, an "employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 204 of the Motor Carrier Act" where so insubstantial and sporadic a part of his activities has any relation to the sphere of the Interstate Commerce Commission. Clearly, as to approximately 97 per cent of his activities he is not such an employee. The purpose of the Fair Labor Standards Act to have the overtime provisions of the Act apply to transportation activities which constitute an integral part of production is clear from Section 3 (j) which specifically defines "production" as including "transporting." Cf. *Roland Electrical Co.* v. *Walling*, 326 U. S. 657. Petitioner's drivers spend virtually all of their time in transportation activities which fall within the Act's specific definition of coverage.[11] A

[11] *Rockton & Rion Ry. Co.* v. *Walling*, 146 F. 2d 111 (C. C. A. 4); *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107 (C. C. A. 2); *Gordon's Transports* v. *Walling*, 162 F.

clearer instance of work to which both the minimum wage and overtime provisions (Sections 6, 7, 3 (i), 3 (j)) of the Act were intended to apply would be difficult to find. And the intrastate activities of petitioner's drivers clearly are not exempt work under Section 13 (b) (1).[12]

If it is proper to assume that Congress did not intend to *bring within* the provisions of the Fair Labor Standards Act those engaged in "sporadic or occasional shipments of insubstantial amounts of goods," even by using the term, "any goods," (*Mabee* v. *White Plains Pub. Co.*, 327 U. S. 178, 181), it would seem equally proper to assume that Congress did not intend to *remove* clearly covered employees from its provisions because of their engagement sporadically or occasionally in an insubstantial amount of activities affecting "safety of operation." Neither the language of Section 13 (b) (1) nor its legislative history suggests the result that an employee who, under the Motor Carrier Act, is subject to the Commission's regu-

2d 203 (C. C. A. 6); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. C. A. 6); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Walling* v. *Morris*, 155 F. 2d 832 (C. C. A. 6), certiorari denied as to this point, 330 U. S. 817; *Bowie* v. *Gonzalez*, 117 F. 2d 11, 20 (C. C. A. 1); *Calaf* v. *Gonzalez*, 127 F. 2d 934, 936 (C. C. A. 1).

[12] See *West Kentucky Coal Co.* v. *Walling*, 153 F. 2d 582 (C. C. A. 6); *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 167 (C. C. A. 2); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Reynolds* v. *Rogers Cartage Co.*, 71 F. Supp. 870 (W. D. Ky.); *Walling* v *Villaume Box & Lumber Co.*, 58 F. Supp. 150 (D. Minn.).

latory power as to only 3 per cent of his activities and not subject as to 97 per cent of his activities is to be considered, for purposes of the Fair Labor Standards Act, as subject to the Commission's power for all periods of his activity.[13]

Nothing in the legislative history suggests that Congress intended the hours of drivers to be removed from the coverage of the Fair Labor Standards Act because of occasional small amounts of interstate driving, with respect to which effective regulation of hours by the Commission would be difficult or impossible. On the contrary, the necessity of effective regulation was stressed. The purpose of Section 13 (b) (1) was explained on the floor of the Senate by Senator Black when it was proposed as an amendment to the pending bill. He stated (81 Cong. Rec. 7875):[14]

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[13] Petitioner relies on the Commission's ruling in *Ex Parte No. MC–3*, 23 M. C. C. 1, 39, to the effect that a driver who is engaged in driving in interstate commerce "on any day of a given week" is subject to the Commission's regulations as to weekly maximum hours. The courts and apparently the Commission, however, have not interpreted this ruling as does petitioner, and have not regarded it as intended to apply to small amounts of driving comparable to that performed in the instant case. *Walling* v. *Comet Carriers*, 151 F. 2d 107 (C. C. A. 2); *Connell* v. *Delaware Aircraft Industries* (Del. Super. Ct., July 15, 1947), 7 Wage Hour Cases 182; *Ex Parte Nos. MC–2* and *MC–3*, 28 M. C. C. 125, 139—Conclusions of Law No. 2.

[14] A complete reprint of the discussion on the floor of the Senate appears in Appendix B, *infra*, pp. 46–51.

> * * * it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. * * *
>
> The amendment of the Senator from New Jersey [MR. MOORE] would apply the same principle to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.
>
> * * * * * *
>
> * * * The committee were of the opinion, when we originally took up the bill for consideration, that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. That had not been done by any other governmental agency at the time of the hearings. Consequently the amendment was not adopted by the committee.

This explanation of the purpose of the exemption evidences a Congressional intent to provide an exemption which would avoid regulation of the hours of drivers under the Fair Labor Standards Act if they were subject to regulation by the Interstate Commerce Commission. The legislative discussion leaves room for the theory that the exemption was proposed because it was thought that the hours of work of truck drivers had actually been regulated. It has been held, however,

that the exemption will apply if the power to regulate exists even though it has not been exercised. *Southland Gasoline Co.* v. *Bayley*, 319 U. S. 44. On the other hand, it is clear that the exemption was not intended to apply where the Commission lacks actual power to regulate hours of work. In the present case, the regulation of only the insubstantial amount of time spent in interstate transportation would leave virtually all the working time of petitioner's truck drivers entirely unregulated. This result would hardly seem consonant with the Congressional concern "that the long hours of truck drivers should be regulated in the interest of public safety." 81 Cong. Rec. 7875. Nor would it seem within the contemplation of legislators who "were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work." 81 Cong. Rec. 7875. If anything is clear, it is that Congress did not intend to leave the long hours of drivers without limit.

The rules of construction that have been applied generally in the interpretation of the Fair Labor Standards Act would be subverted if 97 per cent of covered and nonexempt activities were to be taken out from Section 7 because 3 per cent of other activities, sporadically engaged in, were of a nonexempt character. In the circumstances presented here, the special considerations

affecting construction of Section 13 (b) (1) which this Court, in the *Levinson* opinion, found persuasive of the view there adopted, do not militate against recognition of principles of more general application. The applicability of the exemption where less than a substantial part of the employee's activities affects safety of operation in interstate commerce is a question which this Court left open in the *Levinson* and *Ispass* cases, perhaps in recognition of the possibility that in such circumstances "literalness" in the application of Section 13 (b) (1) "may strangle meaning." See *Utah Junk Co.* v. *Porter,* 328 U. S. 39, 44. We submit that here, under the circumstances of the instant case, there is room for application of the principles consistently applied by this and other courts, that the coverage provisions of the Act are to be broadly interpreted (*Roland Electrical Co.* v. *Walling,* 326 U. S. 657, 670; *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda Local No. 123,* 321 U. S. 590, 597) and that exemptions are to be "narrowly construed." *A. H. Phillips, Inc.* v. *Walling,* 324 U. S. 490, 493. With respect to exemptions for the employees of designated types of employers, the courts have held that if an employer engages in activities other than those intended to be exempted, employees in the nonexempt phase of his business are not exempt although literally perhaps within the terms of the exemption. *Wabash Radio Corp.* v. *Walling,* 162 F. 2d 391 (C. C. A. 6); *Walling* v.

Connecticut Co., 154 F. 2d 552 (C. C. A. 2); *Davis* v. *Goodman Lumber Co.*, 133 F. 2d 52 (C. C. A. 4); *Nelson* v. *Agwilines Inc.*, 70 F. Supp. 497 (S. D. N. Y.); *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501 (D. Minn.). And if exempt and nonexempt characteristics of a business are so intermingled as to be inseparable, the exemption has been denied entirely. *Collins* v. *Kidd Dairy & Ice Co.*, 132 F. 2d 79, 80 (C. C. A. 5); *Guess* v. *Montague*, 140 F. 2d 500, 502 (C. C. A. 4); *Wood* v. *Central Sand & Gravel Co.*, 33 F. Supp. 40, 47 (W. D. Tenn.). See also *A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 496, where it was stated that an establishment which combined both wholesale and retail functions would not be entitled to the exemption for retail establishments. Similarly in the cases of exemptions provided for employees engaged in designated types of activities, the performance of both exempt and nonexempt activities by an employee in the same workweek has resulted in the loss of exemption. *North Shore Corp.* v. *Barnett*, 143 F. 2d 172 (C. C. A. 5); *Walling* v. *Haden*, 153 F. 2d 196, 199 (C. C. A. 5); *Anderson* v. *Manhattan Lighterage Corp.*, 148 F. 2d 971 (C. C. A. 2), certiorari denied, 326 U. S. 722; *Shain* v. *Armour & Co.*, 50 F. Supp. 907 (W. D. Ky.); *Walling* v. *De Soto Creamery & Produce Co.*, 51 F. Supp. 938 (D. Minn.); *Fleming* v. *Swift & Co.*, 41 F. Supp. 825 (N. D. Ill.); *Walling* v. *Bridgeman-Russell Co.*, 6 Wage Hour Rept. 132

(D. Minn.); *Walling* v. *Peacock Corp.*, 58 F. Supp. 880, 883 (E. D. Wis.)

It is clear from these decisions that, in denying exemptions where employees have engaged in both exempt and nonexempt work, the courts have recognized that to apply exemptions merely because some exempt work was performed would remove from the scope of the Act activities which were clearly intended to be subject to its provisions. In the balance between coverage and exemption, the decisions consistently have been in favor of coverage. Apparently this general rule was considered inappropriate to the interpretation of Section 13 (b) (1) because it was thought that exemption from the Fair Labor Standards Act hinged upon coverage under another remedial statute, the Motor Carrier Act. *Levinson* v. *Spector Motor Service, supra; Pyramid Motor Freight Corp.* v. *Ispass, supra.* But considerations deemed to justify a disregard of the salutary rule for the interpretation of exemptions when a substantial part of an employee's activities are subject to the Commission's regulatory power would seem to disappear when these activities are of the insubstantial and sporadic character present in the instant case.

A Congressional purpose was to avoid dual regulation of hours by providing an exemption under the Fair Labor Standards Act for those subject to regulation of hours under the Motor Carrier Act. The facts here, however, would vir-

tually never present the Commission with an actual opportunity for regulating the hours of interstate driving or with a situation in which the maximum limitation pertinent to driving in interstate commerce would be applicable. As we have shown, an employee who made one interstate trip at the beginning of a week could be required to work any number of hours the balance of the week without limit under the Motor Carrier Act and without overtime compensation under the Fair Labor Standards Act. For example, if one of petitioner's drivers spends 2 hours during the first day of his workweek in making a trip to a freight depot to pick up interstate freight, the Commission's maximum hours regulations cannot prevent petitioner from requiring the driver to do interplant hauling for 14 additional hours and during 16 hours a day for the remaining six days, making a workweek of 112 hours. Under petitioner's construction of Section 13 (b) (1), the Fair Labor Standards Act would offer no protection, and the purposes of both statutes would be defeated. Where there is regular engagement in a substantial amount of activities affecting safety of operation in interstate commerce, these activities are more likely to occur with sufficient frequency to have the effect, under the Commission's rules, of limiting indirectly the total hours worked by the employee. But this is not so where, as here, the engagement by an employee in such activities is only for brief periods on sporadic occasions, and, to use petitioner's description, a matter of

"happenstance." As we have seen, in 75.6 per cent of the weeks worked by petitioner's drivers (1438 weeks), all trips were intrastate and no trips were made to freight terminals or boat docks (R. 24–27). In 319 weeks, only a single such trip was made and in 85 weeks two such trips were made (Exhibit "C"). In 1842 out of 1903 weeks worked by the drivers (96.4 per cent), not more than two "interstate" trips were made.[15] Only 3.65 per cent of the total trips of petitioner's drivers (R. 15) are trips with respect to which the Commission's maximum hours regulations could apply. It is clear from these facts that as to any individual employee, the occurrence of such trips at times of the day or of the week which would permit the Commission, even indirectly, to regulate hours effectively cannot be

[15] See Statement, pp. 5–6, *supra*.

As shown in Exhibit "C", two employees made only one trip during the year to a boat dock or other interstate terminal (L. Broughton and B. Trew). Two such trips were made during the year by each of three employees (E. Lafnear, A. McCurry, F. Powers), and two employees made only three such trips (E. Curry and L. Gee). One employee made 10 such trips of a total of 374 in the year but those occurred in the first 14 workweeks only and none occurred in the following 20 workweeks in which he was employed (B. Young). Another employee (M. Preston), who totalled 743 trips during the year, made no "interstate" trips to terminals or boat docks in the first 36 workweeks but made five such trips at intermittent intervals in the next 10 weeks, and only intrastate trips until the end of the year. The employee who made the most trips during the year, totalling 998 (J. Mesic) made 15 "interstate" trips but none occurred in the first 32 weeks in the year.

anticipated in any significant number of instances. Consequently, dual regulation of hours under the two Acts would not, as a practical matter, be produced in any significant degree by holding the hours subject to the maximum hour restriction under the Fair Labor Standards Act, and the reason for departure from the ordinary principle of interpreting exemptions is dissipated.

We think it important in the public interest that the solution of the problem of statutory construction presented by the instant case be one that, in its practical application, will allow to the respective statutes areas of operation which will best effectuate the national policy as derived from both Acts. It seems appropriate, in resolving the problem, to take into account the desirability of minimizing difficulties in administration or application of both Acts, and to favor that construction which will most nearly permit the objectives of each statute to be achieved without, as a practical matter, impairing the application of either of them. Such a practical accommodation of the two Acts can be achieved through a reasonable construction of Section 13 (b) (1) which would in no way affect any power of the Commission.

The serious consequences which would follow the rejection of this construction through adoption by this Court of the construction urged by petitioner may readily be illustrated. Many drivers engaged in the production of goods for

commerce within the meaning of the Act, who have consistently received its overtime benefits, would find those benefits summarily withdrawn whenever their employers, fortuitously or purposely, should choose to send them to a terminal to pick up or deliver a piece of interstate freight. Industries engaged in producing for commerce are constantly receiving and shipping interstate freight. Every employer who chose to reduce his labor costs by eliminating overtime would have an easy means at his disposal, limited only by the bargaining power of his employees. This bargaining power would be correspondingly weaker, of course, in unorganized and low-wage plants where the employees are most in need of the protection of the Act. The unfair competition resulting from cutting wages below fair minimum standards, which the Act sought to eliminate, would be likely to recur in many cases. Dissatisfaction among employees would inevitably arise, and labor strife which the Act sought to avoid would be likely to ensue.

The undesirable results which would ensue from the construction urged by petitioner are not confined to drivers, although drivers are involved in this case. If petitioner's construction is accepted, an employer need only assign employees engaged in clerical work or other non-safety activities to loading, repair work, or "helping" (riding on a truck hauling interstate freight) for a few hours each week, and thus subject them

to the "power" of the Commission in order to avoid any actual regulation of hours whatsoever. By this device employees who had already become entitled to overtime compensation under the Fair Labor Standards Act could have this liability nullified retroactively by the subsequent assignment of a small amount of safety work. Thus, an employee who spent 55 hours during the first 5½ days of the workweek in intrastate driving or other non-safety work, so that he would have been entitled to additional compensation under Section 7 for 15 overtime hours, could be divested of this overtime compensation by the assignment of any amount of interstate driving, "helping," or other safety work during the last afternoon of the week.

These consequences would be the natural result of a construction of Section 13 (b) (1) which would permit an employer to leave the duties of an employee substantially unchanged and at the same time avoid his obligation to pay overtime by having him drive to the freight depot once a week. The fact that many responsible employers would not voluntarily resort to such a practice might mean little, if price-cutting by competitors who did not have such scruples should become widespread. We do not think it can properly be assumed that Congress intended the language of Section 13 (b) (1) to be such a statutory strait jacket. Rather, the unusual consequences which would attend an interpretation under which the

exemption would be applicable whenever an occasional safety activity occurred, suggest that such a construction be avoided. *Holy Trinity Church* v. *United States,* 143 U. S. 457; *United States* v. *American Trucking Associations,* 310 U. S. 534, 543.[16]

We do not think that the approval by this Court of the "substantial part" rule would actually create any conflict with the power of the Commission, as a practical matter. It may be doubted whether the Commission, in carrying out its safety program, would ever be able as an administrative matter adequately to police intermittent and insubstantial incursions by local carriers into interstate commerce of the kind involved in the

[16] The construction which the Administrator urges here is not the only alternative to the construction advanced by petitioner. Another alternative would be to construe Section 13 (b) (1) as merely requiring the elimination from overtime computations of those hours spent by an employee in activities affecting safety of operation in interstate commerce. Thus, in a workweek of 60 hours, if 2 hours were occasionally spent in such safety work overtime, compensation would be due for 18 hours on the basis of a 58-hour week subject to Section 7. This would satisfy the literal terms of Section 13 (b) (1) and of the Motor Carrier Act, and avoid overlapping of regulation of hours by the two agencies. Of course, dividing the workweek into exempt and nonexempt segments is contrary to the ordinary interpretation of exemptions under the Fair Labor Standards Act. (See cases cited, pp. 30–32, *supra.*) In the usual case the performance of a substantial amount of nonexempt work entirely defeats the exemption. The *sui generis* character of the Section 13 (b) (1) exemption, however, may warrant the adoption of a different interpretation for this particular exemption.

instant case. There is no suggestion in the record that it has done so with respect to petitioner, or that petitioner has actually qualified or is operating under the Commission's regulations. Conceding, as this Court held in the *Levinson* case, that Congress intended to avoid dual regulation of hours, and recognizing, as this Court did in that case, that there is no necessary inconsistency in the simultaneous application of the two schemes of regulation, we think it may well be presumed that Congress had in mind dual regulation in substance and not merely in form, and that in speaking of "employee[s] with respect to whom the Interstate Commerce Commission has power," Congress meant to exempt only those whose activities as such employees occupy at least a substantial portion of the workweek by which the application of Section 7 and the exemption therefrom must be measured. This conclusion is, moreover, in accord with the result consistently reached by the lower federal courts as well as state courts of last resort."

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[17] *Walling* v. *Comet Carriers, Inc.*, 151 F. 2d 107 (C. C. A. 2); *Fletcher* v. *Grinnell Bros.*, 150 F. 2d 337 (C. C. A. 6); *Griffin Cartage Co.* v. *Walling*, 153 F. 2d 587 (C. C. A. 6); *Musteen* v. *Johnson*, 133 F. 2d 106 (C. C. A. 8); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Porter* v. *Poindexter*, 6 W. H. Cases 586 (C. C. A. 10); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.); *Keegan* v. *Ruppert*, 6 Wage Hour Rept. 676 (S. D. N. Y.); *Crean* v. *Moran Transp. Lines*, 57 F. Supp. 212 (W. D. N. Y.); *Walling* v. *Palmer*, 67 F. Supp. 12 (M. D. Pa.); *Keeling* v. *Huber & Huber Motor Express*, 57 F. Supp. 617 (W. D. Ky.);

Viewing petitioner's operations and his employees' activities in their entirety, we believe, for the reasons given above, that there is nothing in the language or purpose of either Act, in the decisions of this Court, or in the rulings of the Interstate Commerce Commission, which would justify an application to petitioner's drivers of the Section 13 (b) (1) exemption. If the true test is whether they are "plainly and unmistakably within its terms and spirit" (*A. H. Phillips, Inc.* v. *Walling*, 324 U. S. 490, 493), it seems evident that the test has not been met in this case. The objectives of neither the Fair Labor Standards Act nor of the Motor Carrier Act would be furthered, or the national transportation policy [18] of Congress implemented, by a construction of Section 13 (b) (1) and of Section 204 (a) of the Motor Carrier Act which would deny overtime

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Anuchick v. *Transamerican Freight Lines, Inc.*, 46 F. Supp. 861 (E. D. Mich.); *Davis* v. *Southern Calif. Freight Lines*, 8 Wage Hour Rept. 1151 (S. D. Calif., 1945); *McKeown* v. *Southern Calif. Freight Forwarders*, 49 F. Supp. 543 (S. D. Calif.); *Potashnick Local Truck System* v. *Archer*, 207 Ark. 220, 179 S. W. 2d 696; *Colbeck* v. *Dairyland Creamery Co.*, 17 N. W. 2d 262 (S. Ct. S. D., 1945); *Vannoy* v. *Swift & Co.*, 201 S. W. 2d 350 (S. Ct. Mo.); *McDuffie* v. *Hayes Freight Lines*, 71 F. Supp. 755 (E. D. Ill.); *Nelson* v. *Allison & Co.* (E. D. Tenn.), 13 Labor Cases, par. 64,021. *Vannoy* v. *Swift & Co.*, *Nelson* v. *Allison & Co.*, and *McDuffie* v. *Hayes Freight Lines*, *supra*, were decided after this Court's decisions in the *Levinson* and *Ispass* cases, *supra*.

[18] 54 Stat. 899.

compensation to petitioner's employees because of their occasional and sporadic engagement, as an incidental part of such a business, in a very small amount of "interstate" hauling for short distances within a metropolitan area in a single State.

B. In any event, in those weeks in which petitioner's drivers do no "interstate" driving, Section 13 (b) (1) can have no application.—The inapplicability of the Section 13 (b) (1) exemption to petitioner's drivers in the large majority of workweeks in which no interstate driving occurred [19] seems clear, since the Commission's power under Section 204 of the Motor Carrier Act extends only to interstate transportation.[20] The Commis-

[19] The record shows that two of petitioner's drivers were engaged exclusively in these intrastate movements of goods during the entire calendar year preceding the filing of the Administrator's complaint (W. Armbruster and J. Wineinger, R. 16, 26, 27, 49). In the "average" week, 75.6 per cent of petitioner's drivers were exclusively so engaged (R. 16, 25, 49). Twenty-six of petitioner's 43 drivers, or 60 per cent, spent all their time in such intrastate driving during 75 to 100 per cent of the weeks worked in the year (R. 26, 27). All but two, or 95 per cent of the drivers, were engaged exclusively in such intrastate hauling during more than half of the weeks worked (R. 16, 26, 27).

[20] Motor Carrier Act, Secs. 202 (a), (b), 203 (a) (14); *Pyramid Motor Freight Corp.* v. *Ispass*, 330 U. S. 695, 708; *Levinson* v. *Spector Motor Service*, 330 U. S. 649, 673, 685; *Ex parte Nos. MC–2 and MC–3* (Conclusions of Law Nos. 1, 2), 28 M. C. C. 125, 139; *Ex parte No. MC–28*, 13 M. C. C. 481, 482, 488.

sion has recognized this limitation on its authority in its ruling that "if such a driver does not drive or operate a truck in the transportation of property in interstate or foreign commerce for an entire week, he is not subject to the regulations herein prescribed during that week." *Ex parte No. MC–3*, 23 M. C. C. 1, 39. The workweek is, of course, the accepted standard for measuring overtime obligations under the Fair Labor Standards Act. *Overnight Motor Corp.* v. *Missel*, 316 U. S. 572; *Roland Electrical Co.* v. *Black*, 7 Wage Hour Cases 167 (C. C. A. 4); *Walling* v. *Mutual Wholesale Food & Supply Co.*, 141 F. 2d 331 (C. C. A. 8); *Sternberg Dredging Co.* v. *Walling*, 158 F. 2d 678 (C. C. A. 8); *Walling* v. *Silver Fleet Motor Express*, 67 F. Supp. 846 (W. D. Ky.). Accordingly, irrespective of whether the exemption is applicable to any of the drivers in workweeks when they make "interstate" trips, it seems clear that they are subject to Section 7 of the Act in workweeks when they perform no work to which the Commission's power relates. *Reynolds* v. *Rogers Cartage Co.*, 71 F. Supp. 870 (W. D. Ky.); *Hutchinson* v. *Barry*, 50 F. Supp. 292 (D. Mass.).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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APPENDIX A

Section 13 (b) (1) of the Fair Labor Standards Act. (c. 676, 52 Stat. 1060, 29 U. S. C., 201, *et seq.*) provides:

> The provisions of section 7 shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 204 of the Motor Carrier Act, 1935; * * *

The pertinent portions of the Motor Carrier Act (August 9, 1935, as amended, c. 498, 49 Stat. 543, 49 U. S. C. 301) provide:

> SEC. 202. (a) The provisions of this part apply to the transportation of passengers or property by motor carriers engaged in interstate or foreign commerce and to the procurement of and the provision of facilities for such transportation, and the regulation of such transportation, and of the procurement thereof, and the provision of facilities therefor, is hereby vested in the Interstate Commerce Commission.
>
> (b) Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State, or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.
>
> * * * * * *

SEC. 203. (a) As used in this part—

* * * * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part 1, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part 1.

(15) The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

(16) The term "motor carrier" includes both a common carrier by motor vehicle and a contract carrier by motor vehicle.

(17) The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

* * * * * *

SEC. 204. (a) It shall be the duty of the Commission—

(1) To regulate common carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to continuous and adequate service, transportation of baggage and express, uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(2) To regulate contract carriers by motor vehicle as provided in this part, and to that end the Commission may establish reasonable requirements with respect to uniform systems of accounts, records, and reports, preservation of records, qualifications and maximum hours of service of employees, and safety of operation and equipment.

(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. * * *

APPENDIX B

The following extracts constitute the complete debates on the Section 13 (b) (1) exemption of the Fair Labor Standards Act.

Extracts from Cong. Rec., 75th Cong., 1st sess., Vol. 81, Part 7, pp. 7875–7876.

FAIR LABOR STANDARDS IN INTERSTATE COMMERCE

The Senate resumed the consideration of the bill (S. 2475) to provide for the establishment of fair labor standards in employments in and affecting interstate commerce, and for other purposes.

* * * * * *

The amendment to the amendment was agreed to.

Mr. MOORE. Mr. President, I send to the desk an amendment, which I offer to the amendment of the committee.

The PRESIDING OFFICER. The amendment to the amendment will be stated.

The CHIEF CLERK. It is proposed, on page 51, line 2, after "3);", to insert the following:

> or any employee of any common carrier by motor vehicle subject to the qualifications and maximum hours of service provisions of the Motor Carrier Act, 1935 (U. S. C., title 49, ch. 8) provided that the wage provisions of this act shall apply.

Mr. MOORE. Mr. President, strictly speaking, the amendment does not provide an exemption. It refers to the drivers of busses. The bill itself provides that its provisions shall not apply to any railway employees subject to the provisions of the Hours of Service Act.

Of course safety is the important consideration. Under the Interstate Commerce Act it is provided that it shall be the duty of the Interstate Commerce Commission to regulate the qualifications and maximum hours of service of employees of common carriers. Following out that provision and with due regard to safety, the Commission has made a report fixing the hours of labor of bus drivers and employees. My amendment seeks only to include them, as well as railroad engineers and employees, under the terms of the bill. I may say that the amendment has been included in the similar bill now pending in the House.

Mr. BLACK. Mr. President, it was the policy of the committee, in cases where regulation of hours and wages are given to other governmental agencies, to write the bill in such way as not to conflict with such regulation. That action was taken with reference to maritime workers. It was taken with reference to railroad workers insofar as they were governed by the Hours of Service Act.

The amendment of the Senator from New Jersey [Mr. MOORE] would apply the same principle to truck drivers insofar as hours of labor are concerned. It is my understanding that the hours have been regulated by the Interstate Commerce Commission recently.

Mr. MOORE. Yes; it has been done during the present month.

Mr. BLACK. That has occurred since the hearings before the committee. The committee were of the opinion, when we originally took up the bill for consideration, that it was exceedingly important that the long hours of truck drivers should be regulated in the interest of public safety. That

had not been done by any other governmental agency at the time of the hearings. Consequently the amendment was not adopted by the committee.

Speaking for myself personally, it is my belief that it would certainly be unwise to have the hours of service regulated by two governmental agencies. I am further of the opinion that the Interstate Commerce Commission, since it has the power and has exercised it, should be the agency to be entrusted with this duty. We were very much disturbed about the matter of hours of labor required of employees of trucking companies and associations, particularly the long hours the drivers are compelled to work. Undoubtedly the Interstate Commerce Commission has adopted a regulation under that law. So far as the pending amendment is concerned, and so far as concerns the amendment which is to be submitted by the Senator from New York [Mr. COPELAND] with reference to certain employees in the aviation service who are now under the Railroad Labor Act, it is my own belief that both of the amendments should be adopted.

Mr. SHIPSTEAD. Mr. President, I could not hear all the discussion. When I heard the amendment read the matter of truck drivers came to my mind. Am I to understand the Senator from Alabama to say that the Interstate Commerce Commission is now undertaking to regulate hours and wages of truck drivers?

Mr. BLACK. Not wages, but hours of labor.

Mr. SHIPSTEAD. I have reliable information that at least up to 10 days ago truck drivers in my State were being paid $9.60 a week for a 48-hour week. Is there any provision in the bill that can

reach such a situation? Under the ruling of the Interstate Commerce Commission or under the provisions of the bill now before the Senate, can that situation be controlled? Those men are compelled to work for $9.60 per 48-hour week and feed and clothe themselves. That is a situation which to my mind is glaringly bad.

Mr. MOORE. Mr. President, I do not by my amendent seek to fix wages. It relates merely to hours of labor. Under the Interstate Commerce Act the Interstate Commerce Commission is given authority to prescribe maximum hours and qualifications for service. My amendment seeks only to leave the fixing of hours, but not the fixing of wages, with the Interstate Commerce Commission. The bill would take care of the wage question.

Mr. SHIPSTEAD. May I have the assurance of the Senator from Alabama [Mr. BLACK], chairman of the committee, that the bill now before the Senate will take care of a wage situation such as I have described?

Mr. BLACK. Mr. President, as the bill is now written, employees of trucking companies are included in both the minimum-wage and maximum-hour provisions. The amendment of the Senator from New Jersey [Mr. MOORE] would exempt them only from the maximum-hour provision. The question of minimum wages would still be governed by the provisions of the bill. The reason why the Senator from New Jersey is offering the amendment is that the law now imposes upon the Interstate Commerce Commission the responsibility and duty of regulating hours.

As I said, speaking for myself alone, I am of the opinion that it would be very unwise indeed to

seek to entrust the same responsibility to two governmental agencies.

Mr. SHIPSTEAD. I agree with that.

Mr. BLACK. I further believe, inasmuch as the Interstate Commerce Commission regulates truck and railroad employees, and insofar as the law relates to certain aviation employees, the regulation of the hours of such employees should remain with the Interstate Commerce Commission under those laws. Therefore, I do not object to the amendment which has been offered by the Senator from New Jersey.

Mr. SHIPSTEAD. If a trucking company employs 10 persons or less, will this bill apply to it as to wages?

Mr. BLACK. Not if the bill is finally passed with the amendment which was adopted. It would not include any business of any type with 10 employees or less.

Mr. SHIPSTEAD. Then truck drivers would have no remedy if their employer employed 10 persons or less?

Mr. BLACK. The same thing would be true with reference to the employees of any business, because under the amendment which was adopted by the Senate the bill would not apply to any business which employs less than 10 persons.

Mr. MOORE. The interstate commerce law would apply as to hours.

Mr. SHIPSTEAD. As to hours but not as to wages?

Mr. MOORE. No, sir.

Mr. SHIPSTEAD. I am interested in wages.

Mr. COPELAND. Mr. President, in view of the statement of the chairman of the committee, I suggest that my colleague from New Jersey [Mr.

MOORE] modify his amendment by adding, after the parenthesis on line 5, the words:

> And any air transport employee subject to the provisions of title II of the Railway Labor Act approved April 10, 1936.

Mr. MOORE. I accept that modification.

The PRESIDING OFFICER. The question is on agreeing to the modified amendment offered by the Senator from New Jersey [Mr. MOORE] to the amendment reported by the committee.

The amendment to the amendment was agreed to.

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